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IN THE
Supreme Court of the United States

BOY SCOUTS OF AMERICA and MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,
Petitioners,

v.

JAMES DALE,
Respondent.

On Writ of Certiorari to the Supreme Court of New Jersey

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

If unchecked by the strictures of the First Amendment, public accommodations law – newly untethered from its traditional application to businesses serving the general public[1] – would be the death knell of pluralism and diversity in this nation's voluntary private sector.

In their more sweeping arguments, respondent and his *amici* contend that state and local governments have a compelling interest in enforcing all nondiscrimination laws against any organization defined to be a public accommodation. *See* Brief for Respondent ("Resp. Br.") at 34-37; Brief of the Cities of Atlanta, *et al.* as *Amici Curiae* in Support of Respondent ("Cities Brief") at 10-12. That means, for example, that girls may join Boy Scout Troops,[2] that boys may become Girl Scouts, that atheists may join both, and that heterosexuals may demand to lead gay and lesbian organizations. Indeed, this theory would prevent organizations from "discriminating" on the basis of an extraordinary array of criteria, such as prior criminal record, personal appearance, or political affiliation, all of which are covered by some public accommodations laws.[3] This would literally destroy the missions of a host of social, cultural, religious, and charitable organizations – ironically including many of respondent's *amici* – which serve or represent a particular segment of the population. *See generally* Encyclopedia of Associations (Christie Maurer &

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1. *See* Lisa Gabrielle Lerman & Annette K. Sanderson, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 N.Y.U. Rev. L. & Soc. Change 215, 218 (1978).

2. Attempting to avoid this conclusion, *amicus* New Jersey (Br. at 12-13 n.2) points to a statutory exemption that allows entities falling within certain categories to discriminate on the basis of sex, but the only such category within which Boy Scouting might seem to fit – educational institutions – has already been held inapplicable to the organization. 39a-40a. In any event, other states may not have any such exemption.

3. *See, e.g.*, Boston, Mass. Ord. § 12-9(7) (1999) (ex-offender); D.C. Code § 1-2519 (1992) (personal appearance); Seattle, Wash. Mun. Code § 14.08.090 (1999) (political ideology); *see also* Cities Brief at 1-3.

Tara E. Sheets eds., 33d ed. 1998). Indeed, without unequivocal First Amendment protection, the rigor of litigation alone may be enough to bring many private associations to their knees.[4]

As respondent's *amicus* American Jewish Congress comments (Br. at 4-5):

> To allow government to insist on its own, monochromatic, non-exclusionary vision is to allow government to control, dictate, and limit the terms of all private association, and to end all discussion about any groups defined by the "status" of its members. *Hurley v. Irish-American Gay Group*, 515 U.S. 557, 579 (1995). That is an Orwellian vision, incompatible with freedom and the existence of real ideological competition with official (and unofficial) orthodoxies.

As petitioners' *amici* Christian Legal Society *et al.*, representing the experience of often-unpopular campus organizations, observe, when groups are unable to enforce membership and leadership criteria, "small, unpopular groups" can "be easily hijacked by persons who oppose their message." (Br. at

4. The Girl Scouts of the U.S.A. ("Girl Scouts") was sued in California in 1992 for "duty to God" discrimination by the same lawyer who had sued Boy Scouting on behalf of his sons in *Randall v. Orange County Council, Boy Scouts of America*, 17 Cal. 4th 736, 952 P.2d 261 (1998). He sought $250,000 in punitive damages. *See* L.A. Times, Nov. 25, 1992, at B1 ("'I'm after their pocketbooks right now, I'm after everything I can possibly get,' attorney James G. Randall of Orange County said."). While Boy Scouting withstood the eight years of litigation required to win its case, Girl Scouts agreed to change its policy soon after losing a preliminary injunction motion (and the *pro hac vice* motion which would have allowed its chief counsel to argue the matter). It settled by agreeing to allow a girl to substitute any term she chooses in place of God, or no term at all. Joyce Price, *'God' Now Optional in Girl Scout Oath*, Wash. Times, Oct. 24, 1993, at A1; Matt Lait, *Girl Scouts Settle in Pledge Dispute*, L.A. Times, Dec. 7, 1993, at A26. The court of appeal then assessed costs against Girl Scouts. *Cuevas-Macias v. Girl Scouts of the United States*, No. 658630 (Cal. Ct. App. Jan. 11, 1994).

10-11). Indeed, *amicus* Gays and Lesbians for Individual Liberty (Br. at 25-26) points out that affirmance of the decision below would have especially devastating consequences for gay and lesbian organizations, which frequently "seek exclusively gay environments" and would "resist[] . . . leadership by heterosexuals." Its words bear attention:

> Respondent Dale and a number of *amici* gay advocacy groups argue that a loss for the Boy Scouts here would be a victory for gay Americans. But diminution in the scope of freedom of association is not something that gay people should hail. If the BSA loses, private organizations and institutions will have substantially diminished control over the composition of their membership and leadership. For the large number of gay organizations that seek to remain exclusively gay or gay-controlled, this decision could sound a death knell.

Id. at 24.

Perhaps aware that so sweeping a legal regime would plainly violate the First Amendment, respondent and some of his *amici* retreat to a more modest position. Under this view, a private group has a constitutional right to exclude leaders only if it can demonstrate that those leaders would communicate a message inconsistent with the organization's beliefs. But respondent provides no good reason why he should prevail under that standard. No one disputes that Boy Scouting has a moral code, called the Scout Oath and Law, JA 184; no one disputes that authority to interpret it is vested in the National Executive Board, JA 308, JA 329; no one disputes that the National Executive Board takes the view that homosexual conduct is inconsistent with the obligations of the Scout Oath and Law and that open homosexuals are not appropriate role models for youth in the organization, JA 457-461; and no one disputes that James Dale is a self-identified

homosexual who disagrees with those views and asserts the right to be "open" about his sexuality. JA 11. That should be the end of the matter.

I. BOY SCOUTING'S MESSAGE AND DALE'S MESSAGE ARE IN CONFLICT

The crux of respondent's argument is that Boy Scouts of America does not have an expressive purpose related to homosexual conduct, and that even if it did, appointment of an openly gay Scoutmaster would not interfere with it. Neither half of this argument can be sustained.

A. Boy Scouting's Expressive Purpose

This Court has declared it a "fundamental rule" that "a speaker has the autonomy to choose the content of his own message." *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995). This includes not only the right to speak loudly, but the right to speak through "quiet persuasion" or not at all.[5] *Roberts v. United States Jaycees*, 468 U.S. 609, 636 (1984) (O'Connor, J., concurring). Boy Scouting teaches that:

> A Scout is concerned about other people.
>
> A Scout is a friend to all.
>
> He respects those with ideas and customs that are different from his own.
>
> He treats others as he wants to be treated.
>
> A Scout is polite to everyone.
>
> A Scout is kind.

5. Contrary to the argument of the paradoxically–named *amicus* American Civil Liberties Union there is no reason for the Court to be "wary" of an organization's claim that it "purports to represent a set of values that conflicts with the state's antidiscrimination goals." (BR. at 11). The right to represent values conflicting with those of the state was, at one time, the most cherished of civil liberties.

JA 188. Boy Scouting wants boys to be tolerant. But Boy Scouting also wants boys to be morally straight, to live their lives with purity. JA 218. Believing that homosexual conduct, along with other sex outside of marriage, is immoral, Boy Scouting does not want to promote homosexual conduct as a legitimate form of behavior.

Boy Scouting attempts to walk the line between tolerance toward all people and disapproval of some types of conduct. That may be unusual in this age of acrimonious conflict between gay rights advocates and their opponents (though we think it has considerable support among ordinary Americans).[6] It would be a sad day if First Amendment protection were limited to either strident "anti-gay" messages (Resp. Br. at 18) or their opposites. The claim that Boy Scouting can have no protected position other than one of explicit hostility is an effort to disqualify the middle of the political spectrum so that all remaining opponents can be dismissed as extremists.

Boy Scouts of America finds itself in the bizarre position of litigating the question whether it actually has the views it says it has. *Id.* at 34. The record in this case contains five official policy statements of the National Executive Board and testimony by nine present and former Scout leaders to the existence of the policy. JA 457-461, JA 160-161, JA 183, JA 312, JA 444, JA 451, JA 465, JA 692-693, JA 746, R 3254. The Chancery Court found that "[s]ince its inception, Scouting has sincerely

6. *See* Andrew Sullivan, Virtually Normal: An Argument About Homosexuality 98 (1995) (describing this general position as "one of the most civilized responses to the homosexual question"). *See also* Michael W. McConnell, *What Would It Mean to Have a "First Amendment" for Sexual Orientation?*, *in* Sexual Orientation & Human Rights in American Religious Discourse 235-36 (Saul M. Olyan & Martha C. Nussbaum eds., 1998) (suggesting that government should protect both the right of homosexuals to act in accordance with their orientation and the right of other private persons to act in accordance with their moral convictions on the matter).

and unswervingly held to the view that an 'avowed,' sexually active homosexual is engaging in immoral behavior which violates the Scout Oath and the Scout Law. . . ." 223a. The California courts reached the same conclusion after full trial. *Curran v. Mount Diablo Council of Boy Scouts of America*, No. C 365529, slip op. at 12 (Cal. Super. Ct. July 25, 1991), *aff'd in rel. part*, 48 Cal. App. 4th 670, 29 Cal. Rptr. 2d 580 (1994) (rev'g application of state law), *review granted and opinion superseded by* 17 Cal. 4th 670, 952 P.2d 218 (1998). The primary sponsoring institutions of Scouting corroborate Scouting's position. Brief of National Catholic Committee on Scouting, *et al.* as *Amici Curiae* in Support of Petitioners at 15-16.[7]

The authenticity of this policy, therefore, cannot credibly be doubted. But even if there were no historical consistency in Boy Scouting's position, the First Amendment permits groups to

7. Respondent's notion that Boy Scouting's policy has been "stealthily implemented" without the knowledge of the members is belied by the evidence of his own witnesses: (1) one learned about the policy in October 1991 at "a general meeting open to the committee members of the Watchung Area Council" in New Jersey, JA 152; (2) another read about the policy in December 1992 when *Scouting Magazine* (a magazine sent to all adult leaders, JA 123, R 1583), and his "local Council newspaper" ran articles on the subject, JA 654; (3) another learned about it in 1980 through "media reports" of the *Curran* case, JA 662; (4) another learned about it in September 1991 when he received "the *Scouter's Log* from the Stanford Area Council stating that homosexuals were not eligible to be members or leaders of Scouting because they were not 'morally straight' and were not good role models," JA 668-669; (5) another learned about it in approximately 1985 when he "read about it in a newspaper article about a lawsuit involving BSA," JA 688; (6) another learned about it from his son, a high school teacher, in 1990, JA 625. The Scoutmaster of Dale's former Troop testified: "As an adult leader, I have always understood homosexual conduct to be incompatible with Scouting principles as reflected in the Scout Oath and Scout Law. I believe the other adult volunteer members of Troop 73 also understood that homosexual conduct was inconsistent with Scouting values." JA 465. The Chairman of Dale's Troop Committee from 1987 to 1991 also testified: "As Troop Committee Chairman, I understood homosexual conduct to be incompatible with Scouting principles." R 3254.

change their opinions and adopt new views. Even if Boy Scouting had reached its conclusion for the first time in this particular case, the First Amendment would still provide protection.

Respondent concedes that in determining the nature of an association's beliefs, the reviewing court may conduct only a "limited inquiry" (Resp. Br. at 18) and must be "deferential" (*id.* at 25) to the association's statements. "A reviewing court appropriately examines what message the members of an association collectively seek to express, much as courts examine the existence of religious beliefs and whether they are sincerely held. . . ." *Id.* at 17. Under this exacting standard, there is no conceivable basis for doubt. *Cf. Thomas v. Review Bd. of the Indiana Employment Sec. Div.*, 450 U.S. 707, 714 (1981) ("religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection"). Respondent presented not a scrap of evidence that Boy Scouting's beliefs about homosexuality are insincere, and the suggestion cannot be taken seriously. If undergoing nearly 20 years of unremitting litigation, unfair and unfavorable publicity, and attacks on funding sources is not evidence of Boy Scouting's sincerity, what could be? If respondent means to suggest that the Court should undertake its own examination of whether the organization's leadership faithfully reflects the views of the members, that suggestion should be rejected. Organizations have the right to determine their own beliefs through their own internal procedures.[8]

8. Respondent claims that "[m]any within Scouting at every level have loudly voiced their condemnation of the exclusionary practice," contrasting it with "the *true* tenets of Scouting." Resp. Br. at 28-29 (emphasis in original) (footnote omitted). However, every organization which sponsors a Scouting unit has a delegate to its local council and every local council has three or more delegates to the National Council, which elects the National Executive Board. JA 308. If any policy did not command the support of the Scouting movement, it would be changed.

The *amici* religious groups supporting Boy Scouting (Roman Catholic, Southern Baptist, Latter-day Saints, Missouri Synod Lutheran, United

Respondent makes much of the claim that Boy Scouting does not exclude *heterosexuals* who espouse the view that homosexuality is "morally straight." No such finding was made below, and it is contradicted by the record. The National Director of Boy Scouting certified that heterosexual Scout leaders who taught Troop members that homosexual conduct is consistent with being "morally straight" and "clean" would be subject to revocation of their registration, JA 746, and the Monmouth Council Scout Executive testified that advocacy of the morality of homosexual conduct by any adult leader would lead to revocation of membership. JA 761. Indeed, as respondent is well aware, the registration of one of his witnesses, David Rice, was revoked for promoting the morality of homosexual conduct with boys in his Troop. *See* Letter from Chief Scout Executive Jere B. Ratcliffe to David A. Rice <http://boyscout.home.texas.net/RICE007.htm> (visited Apr. 14, 2000).[9] But even if this

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Methodist Men, National Council of Young Israel) represent over two thirds of the Scouting units sponsored by churches and synagogues, while the religious *amici* supporting respondent represent sponsors of many fewer units. The Methodist social action group supporting respondent seeks government compulsion to force Boy Scouting to do what it has been unable to persuade the Methodist Church to do. The *Book of Discipline* of the United Methodist Church bars appointment of sexually active homosexual clergy. JA 709, R 4800. In any event, *amicus* United Methodist Men has been vested with authority to control the Methodist Church's relations with Scouting, and it does not accept the social action group's views.

9. Evidence of the revocation of David Rice's membership (Tr. 2470) was conspicuously omitted from the substantial sections of the record in *Pool & Geller v. Boy Scouts of America*, Nos. 93-030-PA, 93-031-PA (D.C. Dep't of Human Rights & Minority Bus. Dev.) (post-hearing briefing concluded May 18, 1998), *sub judice*, which counsel for Pool and Geller chose to lodge in this Court. *Amici's* carefully excerpted selection of their clients' case is an attempt to re-litigate a matter heard, but undecided, by the District of Columbia Department of Human Rights and Minority Business Development. We respectfully request that the Court either ignore this attempt, since the

were true, Boy Scouting would be entitled to judge that a person who avowedly *acts* contrary to the Scout Oath and Law is a more objectionable role model than a person who disagrees with it in the abstract.

B. The Expressiveness of Dale's Proposed Participation

Respondent Dale claims that, if allowed to be a Scoutmaster, he would communicate Boy Scouting's message and would not communicate an unwelcome message of his own. Resp. Br. at 31, 43. For the most part, this is predicated on his opinion that Boy Scouting's moral message is consistent with homosexual conduct. Thus, when Dale says he is willing "to continue expressing 'the Oath and Law['s] positive moral code for living'" (*id.* at 33) (citation omitted), he means that he will impart *his interpretation*. He has never promised that he would impart *Boy Scouting's interpretation*, which he has described as "bad" and "wrong." JA 513.

In his brief, respondent attempts to hide his expressive intentions. He asks the Court to ignore the fact that he is a gay activist (Resp. Br. at 33-34 n.29), and that he has made numerous statements about his pride in being gay and about the importance of gay role models. JA 470, JA 497-498, JA 513, JA 549, JA 126, L 10. He portrays this case as one about "identity-based discrimination" and not speech. Resp. Br. at 17, 39. He claims that his openness regarding his homosexual orientation carries no message beyond a simple identification of his status. *Id.* at 32.

This represents a shift in litigation tactics. In his Complaint, respondent asserted the legal right to be "open" and "honest" about his sexual orientation, and alleged that "the only gay Scouts singled out for exclusion" are those who "become leaders in their community and are open and honest about their sexual orientation." JA 11. Then, he wanted to be expressive – "open."

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evidentiary gaps are apparent from the above omission alone, or take judicial notice of the entire record and post–hearing briefs in that matter.

Indeed, he came to the attention of Monmouth Council because of newspaper reports of a speech he made in his capacity as Co-President of the Rutgers University Gay/Lesbian Alliance, urging the need for gay role models for teens. JA 126, L 10. He gave interviews to the national media to express his pride in being gay, and to associate that pride with his training as a Boy Scout. JA 470, JA 513. Now, by contrast, he says that he has no desire to communicate "anything other than Scouting's own organizational message," and complains that Boy Scouting is "insinuating" that he has a certain view on the morality of homosexuality. Resp. Br. at 32, 33, 43.

In other contexts, gay rights advocates (including respondent's counsel of record and many of the *amici* and their counsel) have consistently argued that "coming out" is an expressive and political act. *See Amici Curiae* Brief of the ACLU and Lambda Legal Defense and Education Fund in Support of Appellant at 21-23, 27, *Thomasson v. Perry*, 80 F.3d 915 (CA4 1995) (No. 95-2185) (Describing the discrimination imposed by the "don't ask, don't tell" policy as "viewpoint-based," Lambda and the ACLU maintained that "the Navy discharged Thomasson based on the fact that he had *revealed* his gay identity, not based on that identity itself" and that a "verbal or written 'state[ment] that [one] is a homosexual . . .' is obviously constitutionally-protected pure speech.") (emphasis in original); Evan Wolfson & Robert S. Mower, *When the Police Are in Our Bedrooms, Shouldn't the Courts Go in After Them?: An Update On the Fight Against "Sodomy" Laws*, 21 Fordham Urb. L.J. 997, 1025 n.100 (1994) (there are "inherently political dimensions to being openly gay or lesbian"). In their *amicus* brief for the Society of American Law Teachers (Br. at 7, 9) in this case, Nan D. Hunter and David Cole write:

> Unlike the gay contingent in *Hurley*, Dale was expelled for his identity, not his views. He was expelled based on a newspaper article that reported only that he was gay and involved in a gay student group. . . .
>
> The Boy Scouts seek to collapse the line between status and speech by using the terms "avowed homosexuals" or "openly gay" persons. But that conflation does not transform the Boy Scouts' status-based discrimination into speech-based discrimination.

In her professional writing, however, Hunter has written:

> As it has emerged in lesbian and gay rights case law, "identity" is a multilayered concept. The idea of identity is more complicated and unstable than either simply status or conduct. It encompasses explanation and representation of the self. *Self-representation of one's sexual identity necessarily includes a message that one has not merely come out, but that one intends to be out – to act on and live out that identity.*

Nan D. Hunter, *Identity, Speech and Equality*, 79 Va. L. Rev. 1695, 1696 (1993) (emphasis added). Similarly, Cole has taken the position that self-identification as gay is "pure speech," and that exclusion for self-identification is a speech-based exclusion and not a status-based exclusion. David Cole & William N. Eskridge, Jr., *From Hand-holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 Harv. C.R.-C.L. L. Rev. 319, 337, 321-322, 325 (1993). *See* William N. Eskridge, Jr., Gaylaw: Challenging the Apartheid of the Closet 176 (1999) ("An admission of sexual identity is expressive in the strictest sense of the word."); *id.* at 306 ("Coming out of the closet as a gay person is an act of self-identification that is also an explicitly political act.").

Courts have reached the same conclusion. *See Fricke v. Lynch*, 491 F. Supp. 381, 384-85 (D.R.I. 1980) (holding that gay student's seeking to attend high school prom with male escort had "expressive content" and constituted a "political" "mes-

sage"); *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*, 24 Cal. 3d 458, 488, 595 P.2d 592, 610 (1979) ("[T]he struggle of the homosexual community for equal rights . . . must be recognized as a political activity. . . . [O]ne important aspect of the struggle for equal rights is to induce homosexual individuals to 'come out of the closet. . . .'"); *Dale v. Boy Scouts of America*, 308 N.J. Super. 516, 560, 706 A.2d 270, 293 (1998), 149a (Appellate Division majority describing Dale's statements as an "exercise of his own First Amendment right").

It is disingenuous to suggest that "coming out" is expressive when the individual seeks First Amendment protection, but is nonexpressive when organizations with contrary views prefer not to be associated with the message.

II. BOY SCOUTING'S INTERACTIONS WITH GOVERNMENT DO NOT DEPRIVE IT OF ITS CONSTITUTIONAL RIGHTS

Apparently recognizing the inadequacies in the First Amendment analysis employed by the New Jersey Supreme Court, respondent reaches to develop a new rationale based on Scouting's supposed "entwinement" with the government. Resp. Br. at 11. The court below did not rely on any such theory: while it treated contacts with the government as relevant to whether Boy Scouting is a public accommodation under state law, the New Jersey Supreme Court did not claim that organizations with governmental connections have reduced First Amendment protection. Nor did respondent make this argument below.

The kinds of interactions identified by respondent and his *amici* are so common (almost unavoidable in this age of pervasive government) that their theory would serve to disqualify virtually every group and many citizens from enjoying First Amendment rights. *See* Brief of *Amici Curiae* Eagle Forum Education & Legal Defense Fund, *et al.* in Support of Petitioners ("Eagle Forum Brief") at 19-21. The assertion in the New Jersey Brief

(at 14) that Boy Scouting enjoys a "uniquely high level of governmental support" is ludicrous. While many private social service agencies and many private individuals receive almost all of their funding from government, petitioners are virtually entirely privately funded. *Cf. Rendell-Baker v. Kohn*, 457 U.S. 830, 840 (1982) (private school more than 90% funded by state not state actor). For the most part, the cited interactions consist of access to public lands or buildings on the same basis as other community groups, non-financial sponsorship by public entities, and authorizations to various government agencies to provide relatively trivial in-kind benefits that are available to other not-for-profit youth groups as well.

Boy Scouting asserts no right to governmental benefits beyond those that are provided to other private groups, but its enjoyment of equal access to government property and other equally available benefits cannot be the basis for forcing the organization to forfeit its First Amendment rights. *See Widmar v. Vincent*, 454 U.S. 263, 277 (1981). To the extent that New Jersey sponsors Scouting units or provides special benefits, it is entitled to withdraw support if it now disapproves of Scouting.[10] But the state cannot leverage its relatively minor involvement with the organization into control over its constitutionally protected decisions.

A. Federal Government Contacts. It is clear that Boy Scouts of America has not lost its First Amendment rights, or its "essentially private character" because it is incorporated under federal rather than state law. In *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 543-44 (1987), this Court rejected the contention that since the United States

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10. It is absurd to suggest that "allowing BSA to discriminate would, in effect, cause government to sponsor the very activity it seeks to prevent." Resp. Br. at 36. No one is "causing" any government agency to sponsor Scouting. It is the agency's choice.

Olympic Committee was federally chartered, it thereby became a government actor. The Court explained: "All corporations act under charters granted by a government, usually by a State. They do not thereby lose their essentially private character."[11] *Id.* Among the dozens of groups that have federal charters are groups based on religion (such as the Jewish War Veterans), 36 U.S.C.A. §§ 110101-110112 (West Supp. 1999), ethnicity (such as the Polish Legion of American Veterans, U.S.A.), 36 U.S.C.A. §§ 170501-170512 (West Supp. 1999), sex (such as the Ladies of the Grand Army of the Republic), 36 U.S.C.A. §§ 130101-130113 (West Supp. 1999), and ancestry (such as the National Society, Daughters of the American Colonists), 36 U.S.C.A. §§ 152901-152913 (West Supp. 1999). Nor do federal tax exemptions (Resp. Br. at 14-15) deprive Boy Scouting of First Amendment rights. Such a notion would eliminate First Amendment freedom for virtually every not-for-profit group in America. That the organization has designated the President of the United States as its honorary president is without legal significance, as is the fact that many members of Congress once were Boy Scouts.

Other federal government contacts discussed by respondent are mostly with the military. In light of the military's unusual posture as providing a mini-civil society for its members, the military supports numerous organizations – including churches – that are outside the usual range of public institutions. *See Katcoff v. Marsh*, 755 F.2d 223, 234-35, 237 (CA2 1985).

B. New Jersey Contacts. The evidence of a "close relationship" with the State of New Jersey is trivial in the extreme. These contacts consist of one statute permitting (but not requiring) the

11. Respondent points to the requirement of filing an annual report with Congress (Resp. Br. at 38), but annual reports are required of other federally chartered corporations, *see, e.g.*, 36 U.S.C.A. § 220511 (West Supp. 1999), as well as by many state corporation laws. *See, e.g.*, N.J. Stat. Ann. §§ 14A:4-5, 15A:4-5 (West Supp. 1999).

Fish and Game Board to stock bodies of water at camps of Boy Scouts and other youth organizations, and another statute exempting vehicles owned by a variety of organizations, including local councils of the Boy Scouts of America, from motor vehicle registration fees. N.J. Stat. Ann. §§ 23:2-3, 39:3-27 (West 1997 & Supp. 1999). There is no evidence in the record that either of the petitioners received any fish, and in any event, both benefits are equally available to other youth organizations.

C. Local Contacts. The principal contact Scouting has with governmental bodies is that a small percentage of Scout Troops – less than 10% – are sponsored by public institutions such as schools or public housing agencies.[12] Sponsorship, however, does not necessarily, or even typically, entail material assistance. Boy Scout Troops do not ordinarily receive any funding at all from their sponsors. R 981. There is no evidence in the record of any Boy Scout Troop receiving public funding in this case.[13]

Whatever legal or political issues sponsorship may raise for the government sponsor,[14] they do not affect Boy Scouting's rights. As the Eagle Forum Brief (at 21) so well observes, the sponsoring entities

12. Respondent exaggerates the number by including Troops that are sponsored by PTAs and "other academic and educational organizations." Resp. Br. at 2. PTAs are voluntary not-for-profit organizations, not government entities. *See* I.R.C. § 170(c) (1999); National PTA Fast Facts 1999-2001 <http://www.pta.org/apta/fastfcts.htm (visited Apr. 14, 2000).

13. While sponsor funding is not usual or expected, there is no prohibition on sponsor funding, and counsel is aware of instances of Troops outside of New Jersey serving impoverished communities which have received financial support from a sponsoring church, housing authority, or school.

14. In *Winkler v. Chicago Public Schools*, No. 99-2424 (N.D. Ill. filed Apr. 14, 1999), plaintiffs have sued the government (but not Boy Scouts of America) to end sponsorship of Troops by the Department of Defense, Department of Housing and Urban Development, and government entities in Illinois. If successful, the result would largely fall on housing projects which now sponsor Scouting for inner-city youth lacking other resources.

> have agreed to be agents for the Boy Scouts, and have agreed to conduct themselves and to instruct their charges according to the rules and values of the Scouts. At no time was the Boy Scouts ever given as a condition of accepting such sponsorship the requirement that it alter its membership practices. Had it been confronted with such a condition it would have been up to the Scouts whether to accept the condition or to reject the erstwhile sponsor. But the Scouts having never accepted such a condition *ex ante*, a court cannot use the current sponsorship to impose the condition *post hoc*.

Whether or not sponsored by public schools, some Boy Scout Troops and Cub Scout Packs, like many other community groups, hold monthly or weekly meetings in school buildings outside of school hours and hold an annual evening recruiting meeting in school buildings. Of course, schools which have elected to make their buildings available for use by community groups outside of instructional time cannot discriminate on the basis of the group's viewpoint, *see, e.g.*, *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 385, 393-95 (1993); *Sherman v. Community Consol. Sch. Dist. 21*, 8 F.3d 1160, 1165 (CA7 1993), *cert. denied*, 511 U.S. 1110 (1994), and Boy Scouting claims no right of access to school buildings greater than that of other community groups.[15]

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15. Confusing a program which terminated many years ago with its substitute, Learning for Life, the New Jersey Supreme Court erroneously implied that Scouting was being conducted in school during the school day. 29a-30a. The Learning for Life program is offered by Learning for Life, a separate 501(c)(3) corporation affiliated with Boy Scouts of America. It is purely a curricular program, and does not involve membership in Boy Scouts of America. JA 307, JA 369. Since Learning for Life was created, there has been no Scouting program offered in school during the school day. R 1363. The *amici* brief of the American Association of School Administrators and various school boards

Other supposed governmental contacts discussed by respondent and his *amici* involve material outside the record. Most of this is trivial, even if true. For example, the State of New Jersey (Br. at 2) cites "free use of public parks." Heretofore, parks have been regarded as venues for the exercise of First Amendment rights, *see, e.g.*, *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983), and it has never been supposed that by enjoying a public park one forfeits one's First Amendment rights. Another *amici* brief proposes to deprive Boy Scouting of its First Amendment rights because boys *help the government* by picking up trash in the national parks. Brief of *Amici Curiae* American Association of School Administrators, *et al.* in Support of Respondent at 8. In a particularly remarkable passage, the State of New Jersey (Br. at 2) states: "BSA reinforces this close relationship to government among scouts, conferring merit badges for 'citizenship' based on familiarity with the Declaration of Independence, the Constitution and the Bill of Rights. . . ." Apparently, by teaching about First Amendment rights, Boy Scouts of America should be held to have lost them.[16]

(at 13) reaches outside the record to assert that Police Departments sponsor many "Explorer" units. The term "Exploring" was formerly used for Boy Scouting's oath-based membership program for older teenagers. In 1998, that program was restructured. The membership program was renamed Venturing. The term "Exploring" was attached to a new, career-oriented program within Learning for Life. This is the program discussed in the School Administrators' brief. It is not a membership organization, and its participants do not subscribe to the Scout Oath and Law. JA 307.

16. The first example of a constitutional right given in the *Boy Scout Handbook* is that of freedom of association ("*Do you like to get together with your friends*? Do you read all sorts of books and newspapers? Do you live in a home no one can enter unless they are invited? *Those are your rights.*") JA 190 (emphasis added), and the *Handbook* quotes the First Amendment in full. JA 199-200.

If governmental contacts of this sort were sufficient to remove First Amendment protection, *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), would have come out the other way. The St. Patrick's Day Parade was founded by the City of Boston, until recently received public funds and used the city's official seal, takes place entirely on government property, receives a special and exclusive permit from the government, involves the participation of city officials, and has all the public visibility and prominence that features so largely in respondent's description of Boy Scouting. *See id.* at 560. Boy Scouting, by contrast, was established through private efforts, rarely receives public funds, conducts most of its activities on private property, and enjoys no special legal status (other than a charter). If the organizers in *Hurley* enjoyed First Amendment rights, Boy Scouting is an *a fortiori* case.

III. NO COMPELLING GOVERNMENTAL INTEREST JUSTIFIES INFRINGEMENT OF BOY SCOUTING'S FIRST AMENDMENT RIGHTS

It cannot be true that states automatically have a compelling interest in applying "all extant categories of discrimination" contained in state law in every possible instance. Resp. Br. at 36. That would be the end of all freedom of association – a consequence respondent purports to disavow. *Id.* at 38.

Respondent's claim of a compelling governmental interest is overbroad in three respects. First, while this Court has identified certain bases for discrimination – such as racial discrimination in education – that are genuinely compelling, see *Bob Jones Univ. v. United States*, 461 U.S. 574, 603-04 (1983),[17] it has never

17. Racial discrimination may be a unique case. The Thirteenth Amendment, which is the only provision of the Constitution directly applicable to private persons, expresses a constitutional commitment to the principle of racial nondiscrimination throughout society, which does not exist in the case of other forms of discrimination. Even with regard to racial discrimination, however,

suggested that the mere inclusion of a category – for example, personal appearance – in a state public accommodations statute automatically creates a compelling interest. Sexual orientation nondiscrimination has never been elevated to the status of a compelling interest. *See, e.g., Romer v. Evans*, 517 U.S. 620, 631-32, 635 (1996) (subjecting sexual orientation discrimination to rational basis scrutiny).

Second, while this Court has recognized that protection of equality of access to certain benefits and opportunities constitutes a compelling interest, it has never suggested that there is a compelling interest in guaranteeing access to every institution that might be defined as a "public accommodation" under state law. *See Roberts v. United States Jaycees*, 468 U.S. 609, 623, 626, (1984). The state had an especially strong interest in admission of women to the Jaycees and the Rotary Club because those organizations are the locus of business networking and the state has an interest in ensuring that women are not shut out of the economic marketplace. Boy Scout Troops are closer to the sphere of family, church, and morality, where the government should take a hands-off policy, than to the commercial sphere where the government is a guarantor of equality. Indeed, it

First Amendment freedom of association can sometimes prevail. *See Cuffley v. Mickes*, Nos. 99-2334, 99-2501, 2000 WL 336668, at *3-4 (CA8 Mar. 31, 2000) (holding that the Ku Klux Klan has the right to discriminate based on race and religion in membership). In light of respondent's heavy reliance on *Runyon v. McCrary*, 427 U.S. 160 (1976), we point out that *Runyon* involved the federal government's authority under the Thirteenth Amendment to require a for-profit school to admit black students. This case does not involve racial discrimination, does not involve the Thirteenth Amendment, and does not involve for-profit activity. The Court expressly noted that *Runyon* did not present "any question" regarding the "right of a private social organization to limit its membership on racial or any other grounds," the rights of schools to limit membership on the basis of sex, religion, or other nonracial grounds, or the rights of sectarian, as opposed to commercial, schools. *Id.* at 167.

required a considerable legal stretch to place a Boy Scout Troop in the category of "public accommodation" even under the New Jersey public accommodations law. Every other state supreme court or federal appellate court to consider the issue has concluded that Boy Scouting is not covered by such laws.[18] It is difficult to see how New Jersey can be said to have a compelling interest in coercing membership in a Boy Scout Troop when no other state has deemed Boy Scouting a public accommodation at all.

Third, while the state has a compelling interest in protecting the right of individuals to access to housing, medical care, transportation, and many other necessities of life, it is difficult to see respondent Dale's interest in a similar light. Being a Scoutmaster is a service rather than a benefit; it is not something that most adults without children in the Scout Troop would have any desire to do. It may be a civil right to go to school or even to join a private business networking organization, but it is not a civil right to assist in raising other people's children.

CONCLUSION

For the foregoing reasons and the reasons set forth in the Brief for Petitioners, the judgment of the Supreme Court of New Jersey should be reversed and the case remanded with directions that judgment be entered for Petitioners.

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18. *See, e.g., Welsh v. Boy Scouts of America*, 787 F. Supp. 1511 (N.D. Ill. 1992), *aff'd*, 993 F.2d 1267 (CA7), *cert. denied*, 510 U.S. 1012 (1993); *Curran v. Mount Diablo Council of the Boy Scouts of America*, 17 Cal. 4th 670, 952 P.2d 218 (1998); *Randall v. Orange County Council, Boy Scouts of America*, 17 Cal. 4th 736, 952 P.2d 261 (1998); *Quinnipiac Council, Boy Scouts of America, Inc. v. Comm'n on Human Rights & Opportunities*, 204 Conn. 287, 528 A.2d 352 (1987); *Seabourn v. Coronado Area Council, Boy Scouts of America*, 257 Kan. 178, 891 P.2d 385 (1995); *Schwenk v. Boy Scouts of America*, 275 Or. 327, 551 P.2d 465 (1976).

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